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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-552.

LOUIS B. SCHWARTZ and BERNARD L. SEGAL,
Petitioners,

v.

DEFENDER ASSOCIATION OF PHILADELPHIA,
Respondent.

(In re Amendments of Articles of Incorporation of Defender Association)

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF OF RESPONDENT DEFENDER ASSOCIATION OF PHILADELPHIA IN OPPOSITION TO THE PETITION AND APPENDIX.

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QUESTION PRESENTED.

Does the mere fact that the board of directors of a non-profit corporation, organized to provide legal representation for indigent persons accused of crime, is composed of persons representing both public and private interests violate the Sixth and Fourteenth Amendments to the Constitution of the United States when the highest court of a state has found, after a full evidentiary hearing and careful consideration of the record, that the organizational structure of the defender corporation adequately safeguards the independence of the defender services and protects against potential conflicts of interest in the representation of indigent criminal defendants?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Section 707 of the Pennsylvania Non-Profit Corporation Law of 1933, Act of May 5, 1933, P. L. 289, art. VII, § 707, 15 P. S. § 7707, provides in pertinent part:

> ". . . [A non-profit] corporation or its representative shall present an application for the amendment of its articles to the court, and shall present to the court the articles of amendment. . . . The court shall consider the application. It may hear the evidence on behalf of the applicants and against the application, if there by any. . . . If the court shall be of the opinion that the amendments are lawful, will be beneficial and not injurious to the community, and do not conflict with the requirements of this act, the court shall so certify on the articles of amendment, and shall order and decree thereon that the articles of amendment are approved."

The Sixth and Fourteenth Amendments to the Constitution of the United States are set forth at page 3 of the Petition.

STATEMENT OF THE CASE.

The facts necessary to this Court's consideration of the issues raised by the petition for a writ of certiorari are fully set forth in the Opinion of the Supreme Court of Pennsylvania, 307 A. 2d at 907-909 (Appendix to Petition, pp. 2a-6a).

Despite petitioners' statement that the facts are largely "undisputed" and "recited in the opinions below", their factual statement is keyed to the transcript of testimony in the trial court and they seek to reargue the significance of the referenced statements in this Court. Moreover, petitioners attempt to supplement the record by reference to newspaper accounts of facts referred to in the dissenting opinion in the court below, but admittedly not of record in this case (Petition, pp. 7-8). Respondent will not argue either the relevance or probative value of newspaper reports of the alleged attitudes of Philadelphia public officials to this case. However, it is highly improper for petitioners to argue "facts" not found in the record in this Court.[1]

1. The apparent importance of such non-record "facts" to petitioners' position here is underscored by the argument advanced at pages 25-26 of the Petition.

REASONS FOR REFUSING TO ISSUE THE WRIT.

There Are No Important or Special Reasons for Granting the Writ.

This matter concerns an application by the Defender Association of Philadelphia for approval of certain amendments to its Articles of Incorporation under the Pennsylvania Nonprofit Corporation Law of 1933, Act of May 5, 1933, P. L. 289, 15 P. S. § 7001 *et seq.*[2] The Association sought court approval of changes in its organizational structure which were necessary to effectuate a contract for operating funds with the City of Philadelphia.[3] Following a full evidentiary hearing, the Association's application was considered by three levels of the Pennsylvania judiciary, including the Supreme Court of Pennsylvania; in each court, petitioners raised their concern that the changes in the Association's organizational structure would destroy the independence of the Association and introduce an impermissible potential conflict of interest into the defender's representation of indigent criminal defendants. While acknowledging the need for an independent defender free of potential conflicts, the courts below found as a matter of fact that the record demonstrated no threat to the Association's independence by reason of the organizational changes and, thus no actual potential for a conflict of interest.

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2. In 1972, the General Assembly repealed the 1933 Act involved here and enacted a new statute regulating non-profit corporations in Pennsylvania. Act of November 15, 1972, P. L. 271, 15 P. S. § 7101 *et seq.* (Special Supp. 1972). Under the 1972 Act, amendments to the articles of incorporation of non-profit corporations are not submitted to a court, but only require the approval of the corporations' membership. *See* 15 P. S. §§ 7901-7906.

3. A copy of the agreement between the City of Philadelphia and the Defender Association appears in the Appendix, *infra,* at pp. 1a-6a.

However, in approving the amendments, the Pennsylvania Supreme Court did not place a perpetual blessing on the Association and plainly mandated the state courts to remain vigilant in assuring the independence of the public defender. The Opinion of the court below is qualified in the following terms:

> "Our holding in no way precludes the possibility of judicial relief in future if the occasion should arise. As only one example, should it appear that pressure has been brought to bear on Association attorneys to persuade their clients to forego jury trials or appeals in order to avoid the cost to the City that they entail, a clear case of unconstitutional conflict of interest would be made out, not to speak of the standards of professional responsibility. Evidence of improper influence or pressure, whether overt or covert, will trigger an appropriate judicial response." 307 A. 2d at 912 n. 21 (Appendix to Petition at p. 13a).

Thus, the constitutional proposition for which petitioners urge "vindication" was clearly recognized below. In reality petitioners seek still another opportunity to argue the evidence in this case, and hope to overturn the finding of the courts below respecting the Association's independence. In short, petitioners have failed to demonstrate any important or special reason why a writ of certiorari should issue.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD W. MADEIRA, JR.,
JEFFERY CHARLES HAYES,
Attorneys for Respondent,
Defender Association of
Philadelphia.

Of Counsel:

PEPPER, HAMILTON & SCHEETZ.

Certificate of Service.

I hereby certify that on this 26th day of October, 1973, three copies of the Brief of Respondent Defender Association of Philadelphia In Opposition to the Petition were mailed, first class postage prepaid to Bernard L. Segal, Suite 200, 1427 Walnut Street, Philadelphia, Pennsylvania 19102, Attorney for Petitioners. I further certify that all parties required to be served have been served.

/s/ Edward W. Madeira, Jr.,
2001 The Fidelity Building,
123 South Broad Street,
Philadelphia, Pennsylvania. 19109

October 26, 1973

APPENDIX.

Excerpt From Brief of Appellee, Defender Association of Philadelphia, in the Supreme Court of Pennsylvania (Appendix A).

* * *

THIS AGREEMENT, made this 28th day of January, 1969, by and between the CITY OF PHILADELPHIA (called "City"), and the DEFENDER ASSOCIATION OF PHILADELPHIA (hereinafter called "Association").

WITNESSETH:

WHEREAS, the Association has been engaged in the defense of persons accused of crimes for a period of years; and

WHEREAS, the Association has been unable to secure adequate funds to defend persons accused of crimes or charged with delinquency who are unable to secure private counsel; and

WHEREAS, agreement has been reached whereby the City, under certain terms and conditions, will provide funds for such purposes.

NOW, THEREFORE, the parties to this agreement intending to be legally bound agree as follows:

1. The Association shall amend the Articles of Incorporation and/or its by-laws as appropriate to provide as follows:

(a) That the Association shall be governed by a Board of Directors consisting of thirty directors, ten

directors to be chosen by the Mayor with the approval of City Council, and ten directors to be chosen by the members of the Defender Association of Philadelphia, and ten directors by agreement between a majority of the directors selected by the Mayor and a majority of the directors selected by the members of the Defender Association of Philadelphia. Directors shall serve for a term of three years. The members of the initial Board of Directors shall be divided into classes as follows:

(i) There shall be three (3) members of Class A in each group, which members shall serve for the period of one (1) year.

(ii) There shall be three (3) members of Class B in each group, which members shall serve for the period of two (2) years.

(iii) There shall be four (4) members of Class C in each group, which members shall serve for the period of three (3) years.

(b) That the Board of Directors shall select one of their members as Chairman of the Board and of the Executive Committee. The Executive Committee shall consist of thirteen directors, including the chairman and twelve others, of whom four shall be chosen by the directors selected by the Mayor, four shall be chosen by the directors selected by the members of the Defender Association of Philadelphia and four shall be chosen by the other ten directors. The Board of Directors shall select such officers as it may determine and shall appoint the Chief Defender and the First Assistant Defender. The Chief Defender shall appoint such professional, investigative and clerical

staff as are necessary to assure the effective performance of his duties. Except with the approval of two-thirds (⅔) of all the members of the Board of Directors in specific instances, all employees shall be full-time employees.

(c) That the Chief Defender shall be a lawyer in active practice before the Courts of Record of the County of Philadelphia and that he shall have at least five (5) years experience in the active practice of the law.

2. The Association agrees to provide counsel in criminal or quasi-criminal matters to persons unable to obtain an attorney because they lack financial resources. The provision of counsel shall include such investigative, expert or other services as are necessary to assure effective assistance. The areas of representation shall include the following:

(a) Juvenile delinquency;

(b) Any indictable offense at any stage of the prosecution;

(c) Any offense cognizable before the Municipal Court;

(d) Post conviction proceedings;

(e) Habeas corpus proceedings;

(f) Extradition proceedings;

(g) Probation and parole proceedings; and

(h) Appeals in appropriate cases.

The Association shall provide representation in cases assigned by the courts or in cases in which the Chief

Defender determines that a person lacks the financial ability to retain counsel. The Association shall not supply representation to a person accused of crime or charged with delinquency where such representation would constitute a conflict of interest or where the Association determines for other sufficient reason not to represent such person.

3. The services to be rendered under this contract shall be rendered in a professional and ethical manner.

4. The City shall compensate the Association for the services rendered hereunder in an amount to be determined by the Council of the City of Philadelphia from time to time by appropriation. In the event that the Association shall determine that any such appropriation is insufficient it may terminate this agreement upon thirty (30) days written notice.

5. The term of this contract shall be perpetual; provided, however, either party may terminate this agreement on June 30th of any calendar year provided not less than ninety (90) days written notice of such termination is given.

6. Any person who is responsible for the support of any person under the Act of June 24, 1937, P. L. 2045, § 3, as amended (62 P. S. 1973), represented by the Defender shall be liable to the City of Philadelphia for the actual reimbursement of funds expended by the City in connection with that representation for whatever specific expenditure the Defender deems necessary or desirable in that matter. Where any person defended by the Defender can pay for some part of his defense, those funds shall be paid into the City Treasury.

7. The City shall have the right to audit the books and records of the Association. For this purpose such books and records shall be made available to representatives of the Finance Director of the City and the City Controller at such reasonable times as are requested by any such representatives.

8. This contract is entered into under and subject to the provisions of all Acts of Assembly of the Commonwealth of Pennsylvania, the Philadelphia Home Rule Charter and all ordinances of the City of Philadelphia as amended. In the performance of this agreement, no person shall discriminate, nor permit discrimination, against any person because of race, color, religion or national origin.

9. Upon appropriation of funds by City Council for the purpose of this agreement the Association waives any and all right to compensation under a certain Order entered on January 15, 1969 by the Honorable Vincent A. Carroll, President Judge of the Court of Common Pleas of Philadelphia directing the association to defend certain parties and further directing the City to pay for such defense; reserving only to the Association the right to repay any indebtedness and the interest thereon incurred for the purposes set forth in this agreement in such interim period out of such appropriated funds, or if such funds are insufficient therefor, then out of compensation payable under the Order.

10. It is expressly understood and agreed by and between the parties that this agreement sets forth all the promises, agreements and understandings between the parties and that no alteration, amendment, change or addition hereto, shall be valid unless in writing and signed by the parties.

IN WITNESS WHEREOF, the parties agree to set their hands and seals the day and year aforesaid.

CITY OF PHILADELPHIA

By: EDWARD G. BAUER, JR.
City Solicitor

DEFENDER ASSOCIATION OF PHILADELPHIA

By: JOSEPH N. DUBARRY, IV
President

Attested to:

JOS. N. BONGIOVANNI, JR.
Secretary